



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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Bureau of Waste Site Cleanup Financial Inability Program Factsheet

The Financial Inability (FI) Program is used to evaluate Responsible Parties (RPs), Potentially Responsible Parties (PRPs), and Other Persons performing Response Actions (OPs) who claim that they are financially unable to conduct one or more Response Actions at a Disposal Site under M.G.L. c. 21E (Chapter 21E) and the Massachusetts Contingency Plan at 310 CMR 40.0000 (MCP). The Financial Inability Program is the means by which the Massachusetts Department of Environmental Protection (MassDEP) evaluates claims of financial inability pursuant to 310 CMR 40.0172.

Background

To develop the Financial Inability Program, the Bureau of Waste Site Cleanup (BWSC) met with members of the Licensed Site Professional Association (LSPA) and regulated community to obtain feedback regarding design, development, and implementation. BWSC staff also conducted surveys of financial institutions and attended training sponsored by the United States Environmental Protection Agency (EPA). The Financial Inability Program is intended to be fair and consistent for the regulated community, and direct and efficient to administer. It also seeks to balance the need for full financial disclosure with concerns regarding intrusiveness and confidentiality.

Capitalized terms used in this Factsheet shall have the meaning given to them in Chapter 21E and the MCP.

Program Features

Program features include:

- **Application for Financial Inability:** To ensure that MassDEP has all of the necessary information for evaluating a claim of financial inability, MassDEP has developed a standard financial inability application package. Persons wishing to make a claim of financial inability under 310 CMR 40.0172 should obtain an application package by contacting BWSC's Cost Recovery and Fee Unit at the address or telephone number listed below. A completed application package includes, among other items, three (3) years of federal and state tax returns (plus all schedules). It also should contain two (2) estimates by Licensed Site Professionals (LSPs) for the cost of the next required Response Action at the Disposal Site. Applications for financial inability are kept confidential to the extent permitted by law.

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.

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- **Next Required Response Action:** MassDEP's financial evaluation focuses on the next required Response Action at a Disposal Site, not the entire cost of assessment and cleanup. The next required Response Action is the work necessary to complete the next step in the incremental MCP process (e.g., Tier Classification, a Phase II evaluation, or a Permanent Solution Statement). LSP estimates should therefore focus on the next required action which must be completed to maintain compliance.
- **Evaluation Process:** An applicant's financial resources are compared to the cost to conduct the next required Response Action using financial analysis methods developed by EPA and further developed by MassDEP to account for the requirements of Chapter 21E, the MCP and applicable Massachusetts law. An applicant will be deemed to **have** the ability to pay if the costs of conducting the next step of work can be met through available cash and other assets, or by qualifying for a loan using lending industry debt-to-income qualification standards. Living expenses are factored into the evaluation of an individual's financial ability. If the financial inability application is incomplete, the applicant will be requested to supplement his, her or its application. If the financial inability application shows that the claimed financial inability may entirely or partly be the result of asset transfers or other transactions intended to avoid, reduce or postpone the ability to pay for Response Actions, MassDEP may ask for additional clarifying information, or may deny financial inability status. See M.G.L. c. 21E, sec. 5(i). This evaluation forms part of MassDEP's determination as to whether a claim for financial inability is in "good faith," as required by 310 CMR 40.0172(5)(b).
- **Financial Inability Status:** After an OP, PRP or RP submits a completed financial inability application to MassDEP, the agency will notify the applicant in writing as to whether it agrees with his, her or its claim of financial inability. If MassDEP agrees with the claim of financial inability, it will notify the applicant that he, she or it has "financial inability status." MassDEP's determination will include a financial inability status expiration date, an explanation of rights and responsibilities, and information on the re-application process. If MassDEP disagrees with the assertion, the applicant will be issued a denial notice, will be expected to meet all responsibilities under the MCP, and remains subject to all potential enforcement and penalties. This determination is not subject to adjudicatory hearing under M.G.L. c. 30A.
- **One-Year Duration:** In recognition of the fact that financial conditions change with time, financial inability status will be granted for a one-year period. At the end of the one-year period, the applicant must re-apply if he, she or it wishes to retain financial inability status. If the applicant can show that his, her or its financial status is unlikely to change for a longer period of time, the Department may grant financial inability status for two or three year periods.
- **Notification of Changes in Financial Condition and other Notifications Required by MCP:** Persons who have financial inability status are required to notify MassDEP promptly of any changes in his, her or its financial circumstances that would allow resumption of necessary Response Actions. In addition, such persons must give notification of any new releases and/or imminent hazards at the Disposal Site as required by the MCP. See 310 CMR 40.0300.
- **Protection Afforded by Financial Inability Status:** If after reviewing a complete financial inability application MassDEP determines that (a) a claim of financial inability was made in good faith and (b) the next Response Action is beyond the applicant's financial ability, the applicant is entitled to a defense from certain civil administrative penalties. For the defense to apply, the underlying noncompliance must have occurred after the date of the Department's receipt of a completed financial inability application, and must not have involved a failure to notify MassDEP of a Release or Threat of Release. See 310 CMR 40.0172(5).

Financial inability status does not affect the Commonwealth's ability to seek civil penalties through judicial means, MassDEP's ability to seek penalties for noncompliance that occurred prior to receipt by MassDEP of a complete financial inability package, or MassDEP's ability to issue

administrative orders. See 310 CMR 40.0172(6).

- **Cost Recovery and Fees:** Financial Inability status has no effect on an applicant's liability for annual compliance assurance fees, other fees associated with the MCP program, or the Commonwealth's Response Action costs. Persons seeking relief from outstanding fees may make a claim of *Financial Hardship* pursuant to 310 CMR 4.04(c). MassDEP will in appropriate circumstances agree to a payment plan for both fees and the Commonwealth's Response Action costs. MassDEP may also in appropriate circumstances settle a portion of its Response Action costs with liable parties. All cost recovery and fee inquiries should be made to the Cost Recovery and Fee Unit in Boston at 617-292-5545.

Please direct questions and requests for application materials to:

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